IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 78-1501

JAMES JEFFERSON McLAIN, et al.,

Petitioners,

v.

REAL ESTATE BOARD OF NEW ORLEANS, INC., et al.,

Respondents.

On Writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS®

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QUESTION PRESENTED

Does Fed.R.Civ.P.12(b)(1) permit a district court to dismiss an action brought under the Sherman Act after ample opportunity for discovery and an evidentiary hearing fail to establish the requisite nexus between the alleged real estate brokerage trade restraint and interstate commerce?

INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS® (NAR)[1]

Preliminary. NAR's interest in this cause is direct, vital and immediate. Founded in 1908 and headquartered in Chicago, NAR is a non-profit professional association of licensed real estate brokers and salespersons engaged in all phases of the real estate business, including, particularly, brokerage, appraising, management, and counseling.

NAR owns various registered service and collective membership marks, including the mark REALTOR®. Over the years NAR has promoted a public understanding of the term REALTOR® as identifying a member of a member Board of the NATIONAL ASSOCIATION OF REALTORS®, engaged in the real estate business on a professional basis and subscribing to and bound by a reasonable and non-discriminatory Code of Ethics.

NAR has been successful in promoting this understanding and, as a consequence, it and its members are the beneficiaries of "good will" which is recognized as extremely valuable by the public and a large number of real estate practitioners.

Because of the value of the term REALTOR® and also because of the many and varied services available from NAR, real estate boards have sought affiliation with NAR as Member Boards of REALTORS®. Affiliation is accomplished by the issuance of a charter by NAR according membership privileges and granting the Board the right to use the term REALTOR® in a specified geographic area in exchange for the Board's agreement to service its members and the public, to enforce the Code of Ethics and to assist in safeguarding the registered marks of NAR.

[1] NAR has filed this *amicus* brief pursuant to the written consent of petitioners and respondents.

Today, NAR's membership includes 50 State Associations of REALTORS®, over 1700 Member Boards of REALTORS®, and approximately 600,000 REALTORS® and REALTOR-ASSOCIATES®.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities—equal opportunity in housing, real estate licensing, public service neighborhood revitalization, real estate education, home protection, arbitration of member and public controversies and legislation relating to the real estate business.

The Interest of NAR in This Decision. Despite the admittedly local nature of real estate (Pet. Brief at 25) and despite petitioners' admitted failure to produce sufficient evidence of the requisite nexus between respondents' brokerage activities and interstate commerce (Pet. at 7), petitioners now contend the trial court erred in dismissing their complaint for lack of subject-matter jurisdiction.

Petitioners' grounds for appeal directly affect the interests of the NAR and its members for the following reasons:

First, to postpone until conclusion of trial a district court's determination of Sherman Act subject-matter jurisdiction may needlessly subject over 1700 local real estate boards and more than 600,000 REALTORS®, each with distinct factual situations, to the crushing costs and hardships of a full-blown federal antitrust trial. This concern of NAR and its members regarding the future impact of an adverse decision here is hardly theoretical. Petitioners' attorneys, in their application for an extension of time in which to file their petition [presented to Mr. Jus-

tice Rehnquist (acting as Circuit Justice for the Fifth Circuit) on March 14, 1979, one day in advance of the original March 15 due date in disregard of Supreme Court Rule 34(2)], represented to this Court that, in early January, *"with the concurrence of our clients,* who felt equally unable to support a continuation of this litigation" (emphasis added), they were "inclined to abandon" this litigation. Petitioners' attorneys thereafter "received telephone calls from attorneys involved in anti-trust work throughout the United States. . . . [A]ttorneys from Las Vegas, Washington, D.C., Atlanta and Mobile called" to urge application for the writ. (Application, ¶'s XIX—XX).

NAR's over 1700 member boards come in all shapes and sizes, and are located in small, medium and large-size cities, suburbs ("bedroom" communities), towns, rural villages and unincorporated areas. A broadly applicable, adverse ruling based on the meagre facts in the record here would be most unfair and could trigger a flood of litigation, most of which would be brought without any investigation into the factual basis in a particular locality for broad, conclusory restraint of trade and jurisdictional allegations.

. *Second,* the decision will determine the extent to which real estate boards and individual brokers, already governed by state regulations and state antitrust laws, will be subjected to federal antitrust lawsuits.

Third, the decision will vitally affect the nature and type of real estate services which will be made available, the manner in which those services will be performed, and the cost of such services if federal antitrust trials are to be continually confronted. Petitioners have made the following representations regarding the role of REALTORS®:

> Petitioners respectfully submit that the activities of REALTORS® are necessary to the survival and proper functioning of local real estate markets. (Pet. Brief at 46)
>
> • • •
>
> Further, and in a more general sense, REALTORS®, by bringing together buyer and seller and by assisting in the consummation of the transaction, actually "make" the local market in realty. (Pet. Brief at 47)
>
> • • •
>
> In short, REALTORS® "merchandise" homes. If they did not exist, they would have to be invented, or the real estate market would cease to function on a continuing and viable basis. (Pet. Brief at 48)

If petitioners are correct, and REALTORS® are virtually indispensable, then the increased legal costs of having to defend, all the way through trial, class action cases such as the instant case will inevitably be passed on to the consumer in the form of higher commissions.[2]

In actuality, as petitioners make clear (Pet. Brief at 37), of the 50,605 residential real estate transactions across the nation studied in connection with a 1971 joint report of the Department of Housing and Urban Development and

[2] Relevant here is Justice Rehnquist's concurring opinion in *Reiter* v. *Sonotone Corp.,* 1979-1 Trade Cases ¶ 62,688 (U. S. Sup. Ct., June 11, 1979) that "in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services." We note that petitioners' attorneys are underwriting the expense of preparing and presenting this appeal. (Application, ¶ XXI). We note further that two of the petitioners are lawyers (Pet. Brief at 4, n. 1), and the classes have never been certified (Pet. Brief at 8, n. 14). Given the makeup of the class representatives, and the representation to this Court on March 14 that they were "inclined to abandon" the litigation, there is, of course, a substantial question whether or not the class will ever be certified. Nevertheless, respondents must still bear the substantial costs of the defense.

the Veterans Administration (HUD-VA Report), *nearly 40% reported no payment of a real estate commission*. That statistic dramatically refutes the above-quoted representations that REALTORS® are "indispensable." Indeed, if REALTORS® were "indispensable" there would be no need to indulge in the alleged restraint of trade which is the subject of this case, as each REALTOR® could charge whatever the traffic will bear. Such is not the case, and sharply increased legal expenses will no doubt have the effect of driving REALTORS® from the business, and forcing consolidations. Ultimately, large organizations, who may be able to better afford such costs and pass them along to consumers, will take over smaller firms of REALTORS®, thereby reducing competition.[2a]

PURPOSE OF THIS BRIEF AMICUS CURIAE

NAR's purpose in submitting this brief is to present the views of the chief national representative of the thousands of local real estate boards and individual brokers as to the effects of the position urged upon this Court by the United States in its *amicus* brief.

We shall not duplicate the statement of facts and legal arguments presented in the brief for certain respondents. Indeed, we support and adopt those statements and arguments as our own. Nor do we propose to attack the various arguments marshalled by petitioners in their brief. These arguments are fully met elsewhere.

Instead, we focus on the profoundly disturbing implications of the position adopted by the United States in its *amicus* brief. Essentially the Solicitor argues for the virtual abolition of Fed.R.Civ.P.12(b)(1) in antitrust actions and the concomitant expansion of Congressional

[2a] *See, e.g.*, "Why Merrill Lynch Wants to Sell You a House," FORTUNE, January 29, 1979, pp. 86-89.

power under the Commerce Clause into one of the most local types of business activity: the efforts of a state licensed real estate broker or salesperson in New Orleans in bringing together buyers and sellers of New Orleans residential real property. The Solicitor's argument fundamentally misconceives the local nature of the work for which licensed real estate brokers are actually paid.

As the ensuing argument will demonstrate, the district court correctly determined that the activities of the respondents did not substantially and adversely affect commerce, and this finding cannot be overturned unless "clearly erroneous."

ARGUMENT

A. INTRODUCTION

This case involves the constitutional confrontation between an immovable object and an irresistable force. The immovable object is residential real estate in the New Orleans area—an object of quintessential local nature. The irresistable force is the steadily expanding scope of Congressional power under the Commerce Clause—a force that already has absorbed entire fields of state law and clogged the dockets of the federal courts with a multitude of disputes once resolved in state forums. Here, this fundamental clash over principles of federalism arises in the context of a narrow procedural issue: does Fed.R.Civ.P. 12(b)(1) authorize a district court to dismiss an action brought under the Sherman Act after ample opportunity for discovery fails to establish that the alleged activity occurs in or substantially and adversely affects interstate commerce? The Fifth Circuit answered that question in the affirmative, on the facts adduced in the district court. The inherently local nature of real estate brokerage activity, the full

panoply of state remedies for antitrust violations, the time and expense involved in defending a federal antitrust suit, and the overloaded dockets of the federal district courts are factors compelling this Court to affirm that decision.

B. THE FIFTH CIRCUIT HAS DEVELOPED EFFECTIVE GUIDELINES FOR RESOLVING JURISDICTION DISPUTES IN ANTITRUST ACTIONS

In an attempt to strike a balance between the hardships and benefits of an antitrust action, the Fifth Circuit has authorized a rather modest option for its district courts: if the pre-trial discovery and hearings fail to establish the requisite nexus between the allegedly anticompetitive activity and interstate commerce the district court may entertain a Fed.R.Civ.P. 12(b)(1) motion to dismiss the action *unless* "the factual and jurisdictional issues are completely intermeshed." *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315, 1323 (5th Cir. 1978); *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972); *McBeath* v. *Intra-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir. 1967), *cert. denied*, 389 U.S. 896 (1967). If jurisdiction and the merits are inextricably bound, the Fifth Circuit requires "the jurisdictional issues [to] be referred to the merits, for it is impossible to decide the one without the other." *McBeath, supra* at 363.

In the proceedings below the district court was able to separate the jurisdictional issue from the substantive issue. The Fifth Circuit approved, explaining as follows:

> Here, the issues of jurisdiction could be readily separated from the merits. The substantiality of particular interstate commerce and the nature of the defendants' role in such commerce comprise one issue. A separate analytic concept is raised by the question of whether these defendants conspired to fix the price for their services. *McLain, supra*, 583 F.2d at 1323.

Having separated the issues, the district court allowed petitioners months of discovery to establish the jurisdictionally required interstate commerce nexus. The district court carefully reviewed the results of this discovery and concluded that subject-matter jurisdiction did not exist. The Court of Appeals affirmed.[3]

In its *amicus* brief the United States contends the district court erred in dismissing the petitioners' antitrust action despite that court's finding that respondents' alleged activities did not substantially affect interstate commerce. Even though these findings were made after the court provided petitioners with ample opportunity to present evidence of jurisdictional facts, the Solicitor argues that petitioners should be given "an opportunity to prove [their] allegations at trial." (U.S. *Amicus* at 15). The Solicitor's position would virtually force federal courts to passively accept subject-matter jurisdiction over every complaint alleging Sherman Act violations, no matter how local the allegedly anticompetitive conduct appears. Once filed, the complaint would be transformed into a procedural barnacle securely affixed to the court's docket. The district courts, already overburdened, would be forced to postpone until the conclusion of the trial their determination of subject-matter jurisdiction. This is "notice" pleading with a vengeance. It ignores the time and crushing expense of most antitrust trials and casually dismisses the State of

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[3] The Fifth Circuit has carefully policed pre-trial dismissals of antitrust actions by its district courts. In *McLain* the court found the "effective use of discovery" to be the "crucial feature" of the case that permitted dismissal. *Supra*, 583 F.2d at 1323 n. 9. In other cases the Fifth Circuit determined the factual and jurisdictional issues to be so completely intermeshed that a pre-trial dismissal was improper. *See McBeath, supra*, at 363; *Chatham Condominium Assn.* v. *Century Village, Inc.*, 1979-2 Trade Cases ¶ 62,742 (5th Cir. 1979).

Louisiana's genuine interest in the regulation and control of the local activities of Louisiana real estate brokers.

The Solicitor cites *Hospital Building Co.* v. *Rex Hospital*, 425 U.S. 738 (1976), as authority for this position. However, *Hospital Building* plainly suggests that such pre-trial dismissals may be proper after the plaintiff has conducted adequate discovery. In that opinion this Court stated that "in antitrust cases . . . dismissals *prior to giving the plaintiff ample opportunity for discovery* should be granted very sparingly." *Id.* at 746 (emphasis added). That a district court could properly dismiss the action *after* "ample opportunity for discovery" fails to establish the requisite jurisdiction was indicated in a footnote to the opinion:

> It may, of course, be that even though petitioner's complaint adequately alleges an effect on interstate commerce, *further proceedings* in this case will demonstrate that respondents' conduct in fact involves no violation of law, or indeed no substantial effect on interstate commerce. *Id.* at 746 n.5 (emphasis added).

Thus, while *Hospital Building* establishes a strong presumption against the dismissal of an antitrust complaint prior to discovery, that decision plainly permits dismissal of a complaint after "ample opportunity for discovery" has failed to demonstrate the requisite nexus between the alleged restraint of trade and interstate commerce.

Curiously, the Solicitor stresses the interstate movement of home-buyers and then tries to distinguish the one Supreme Court decision most relevant to this type of jurisdictional argument, *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). (U.S. *Amicus* at 16). In *Yellow Cab*, this Court considered the scope of Sherman Act jurisdiction in the context of two fact patterns: (1) a cab service operating exclusively between rail terminals in Chicago, carrying people from one station to the next to continue their interstate journeys; and (2) a cab service serving the general transportation needs of people in the Chicago area, including movement to and from train stations. The former activities were held to be "an integral part of interstate transportation" while the latter operations were found to be beyond the reach of the Sherman Act. *Id.* at 232-233. That *Yellow Cab* remains a significant guidepost for Sherman Act jurisdiction is evidenced by this Court's use of that decision in the recent opinion in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975):

> Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab* we held that such a trip was part of the stream of commerce. *Goldfarb, supra* at 784 n.13.

In this case, the Court of Appeals applied this analogy and found a parallel between the "local" cab operations in *Yellow Cab* and the local brokerage activities before this Court:

> The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators in *Yellow Cab*, the attorneys were invariable and indispensable components of interstate commerce. And, as with the second cab activity in *Yellow Cab*, real estate brokerage does not inherently comprehend the interstate aspects of their business. "To the taxicab driver" or the real estate broker, "it is just another local fare." *McLain, supra*, 583 F.2d at 1322.

Having driven his jurisdictional argument to the brink of *Yellow Cab*, the Solicitor attempts to avoid that precedent on the ground that the alleged restraint of trade in this case "affects"—rather than "occurs in"—interstate commerce. (U.S. *Amicus* at 16). Upon some obscure, ill-defined distinction between "affecting" and "occurring in" interstate

commerce this Court is urged to further expand into the realm of traditional state power the reach of the Commerce Clause. A similar attempt to extend Sherman Act jurisdiction was rejected with language appropriate here:

> This is an effort to utilize incidental minor activities . . . as a jurisdictional foundation for a substantive charge of alleged federal anti-trust violations. The effort is strained and, in this Court's opinion, overreaching. The foundation is patently incapable of supporting such a structure. *Cotillion Club, Inc.* v. *Detroit Real Estate Bd.*, 303 F.Supp. 850, 854 (E.D. Mich. 1964).

In essence, the Solicitor is urging this Court to virtually abolish the use of Fed.R.Civ.P. 12(b)(1) motions in actions brought under the "affecting" interstate commerce theory of Sherman Act jurisdiction. This extreme proposal goes well beyond the opinions in the handful of cases finding jurisdictionally sufficient "affects" on interstate commerce caused by real estate brokerage activities in factual contexts differing from the record here. *United States* v. *Greater Syracuse Bd. of Realtors, Inc.*, 449 F.Supp. 889 (N.D.N.Y. 1978), found Sherman Act jurisdiction over the allegedly anticompetitive activities of a metropolitan real estate board; however, the court stressed that the "existence of Sherman Act jurisdiction must be determined on a case-by-case basis by an evaluation of the relevant economic facts." *Id.* at 891. In distinguishing *McLain*, the district court in *Greater Syracuse* stressed one "significant" factor that established a jurisdictionally sufficient nexus between the brokerage activities and interstate commerce: allegations of "interstate movement of a substantial amount of money in the form of referral commissions and relocation service commissions." *Id.* at 895. By contrast, petitioners here neither alleged nor proved that respondents were substantially engaged in forwarding or receiving substantial amounts of money derived

from interstate referral or relocation services. (Pet. App. 9a).

The Fourth Circuit adopted this case-by-case analysis of Sherman Act jurisdiction in an appeal by real estate brokers of their felony convictions for antitrust violations. *United States* v. *Foley*, 598 F.2d 1323 (4th Cir. 1979). Although jurisdiction in this post-conviction appeal was implied from a general jury finding of guilt, the *Foley* court felt compelled to further distinguish that case from cases like *McLain* on the ground that an unusually high volume of out-of-state buyers and sellers were involved in the real estate market of Montgomery County, Maryland, a peculiarly transient urban area contiguous to Washington, D.C. *Id.* at 1330 n. 4.

Mortensen v. *First Federal Sav. and Loan Ass'n.*, 549 F.2d 884 (3rd Cir. 1977), adopted a highly skeptical stance toward the use of Rule 12 motions in antitrust cases; nevertheless, that court left open the possibility of a pre-trial dismissal where a plaintiff, as here, has been given "ample opportunity for discovery." *Id.* at 896.[4]

Unlike the situations in *Hospital Building, supra,* and *Mortensen, supra,* petitioners here *were* given "ample opportunity for discovery" and these "further proceedings" failed to demonstrate a substantial affect on interstate commerce.

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[4] In addition, the facts in *Mortensen* suggest that sympathy for the plaintiff's lawyer played a significant role in the reversal of the trial court's dismissal of the complaint. Discovery in the civil antitrust suit had commenced in December of 1974. One month later the plaintiff moved for class certification and to amend the complaint. The Rule 23 certification hearing was postponed. The following month the defendants filed a battery of motions seeking dismissal under Rule 12(b)(1), Rule 12(b)(6), Rule 56, etc. Plaintiff's attorney arrived at the hearing in April under the mistaken

C. THE DISTRICT COURT CORRECTLY DISTINGUISHED *GOLDFARB v. VIRGINIA STATE BAR*, 421 U.S. 773 (1975)

To provide petitioners with an opportunity to meet their burden of proving the existence of subject-matter jurisdiction,[5] the district court ordered further discovery regard-

belief that only class certification was to be considered; he apparently believed the defendants' motions would be argued at a later date. Consequently, he was unable to discuss the defendants' various motions. None of the attorneys mentioned the 12(b)(1) motion at the hearing. At the close of the hearing and after the judge indicated he would take the case under advisement, the judge asked, "Can anyone tell me what part of the market the defendants have?" No one could answer, and no subsequent market information was filed with the court. *Mortensen, supra, Id.* at 888 n.11.

In sharp contrast, plaintiffs here were amply prepared to argue the issue of subject-matter jurisdiction, having been given months to devote to the development of their evidence of Sherman Act jurisdiction.

[5] The party asserting federal jurisdiction has the burden of showing that he is properly in federal court. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

> [The plaintiff] must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging justify his allegations by a preponderance of evidence. *Id.* at 189.

See Gibbs v. *Buck*, 307 U.S. 66, 93 (1939) (Black J., Dissenting):

> Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.

ing the applicability of *Goldfarb*, explaining its order as follows:

> We reasoned that, to the extent the financing and insurance aspects of real estate transactions may be shown to be interstate in nature, defendants' practical nexus therewith might satisfy the jurisdictional requirement of the Sherman Act pursuant to the Supreme Court holding in *Goldfarb* v. *Virginia State Bar*. *McLain, supra*, 423 F.Supp. at 983.

In *Goldfarb, supra*, this Court identified two factors that could combine to transform the inherently local nature of the legal services involved in a real estate transaction into activity sufficient to support Sherman Act jurisdiction:

(1) A "substantial volume" of interstate commerce was involved in the overall transaction; and

(2) The challenged activity was an "integral" part of the transaction and "inseparab[le]" from its interstate aspect. 421 U.S. at 785.

The district court reviewed the results of months of discovery and found that petitioners had failed to establish a *Goldfarb*-type basis for jurisdiction under the Sherman Act. Specifically, the court found that petitioners had been

unable to satisfy the second criterion of *Goldfarb*, *i.e.*, that the real estate brokerage at issue constituted an integral part of the interstate commerce of title insurance and realty financing. *McLain, supra*, 432 F.Supp. at 983. Further, the district court found that petitioners had failed to establish evidence in support of their "affecting" commerce jurisdictional theory. *Id.* at 983 n.2, 985.[6]

The district court's findings were clearly reasonable. The four months of discovery produced essentially uncontradicted evidence that the brokerage function terminates when a home-buyer and seller are brought together. Though petitioners produced some evidence that certain real estate funds and title insurance policies are secured or guaranteed by out-of-state sources, none of the evidence refuted testimony that real estate brokers occupy no more than an incidental informational role with respect to these arguably interstate activities. *McLain, supra*, 432 F.Supp. at 984-985. The actual financing and insurance processes involve only the home-buyer and the lender or insurer; the brokerage relationship has already terminated at this point.

[6] Such findings cannot be reversed unless clearly erroneous. When a district court must determine facts in ruling on a Rule 12 motion, these findings are entitled to the "clearly erroneous" standard of review. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 338-339 (1952); 5A Moore's Federal Procedure, ¶ 52.08 at 2738-2739; *Hayes* v. *Parkview-Gem of Hawaii, Inc.*, 71 F.R.D. 436, 440 (D.Haw. 1976); *Krasnov* v. *Dinan*, 465 F.2d 1298, 1299-1300 (3rd Cir. 1972); *Hoffman* v. *Lenyo*, 433 F.2d 657, 658 (3rd Cir. 1970); *Walden* v. *Broce Construction Company*, 357 F.2d 242, 245 (10th Cir. 1966); *Hill* v. *Gregory*, 241 F.2d 612, 614 (7th Cir. 1957). The "clearly erroneous" standard applies even to "inferences drawn from documents or undisputed facts." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963).

D. THE DISTRICT COURT CORRECTLY NARROWED THE SCOPE OF DISCOVERY TO THE APPLICABILITY OF *GOLDFARB*

In focusing the discovery on the issue of applicability of the jurisdictional criteria established in *Goldfarb*, the district court discarded petitioners' allegations that movement of home-buyers constituted an "effect" on interstate commerce:

> [T]he mere interstate movement of a prospective buyer or seller—occurring either prior to or after the furnishing of brokerage services—hardly infuses such services with the requisite impact upon interstate commerce *McLain, supra*, 432 F.Supp. at 983 n.2.

The Fifth Circuit affirmed. *McLain, supra*, 583 F.2d at 1323. Having failed to establish a *Goldfarb*-type jurisdiction the petitioners now argue they should have been given a chance to offer additional evidence concerning the interstate movement of home-buyers. This contention goes to the core of the growing conflict between the "expansive judicial construction of the commerce clause" and "the growing spirit of federalism manifested at all levels of judicial and legislative decisionmaking." *McLain*, 583 F.2d at 1324. Petitioners seek to bootstrap into interstate commerce Louisiana brokerage services involving the quintessential local product: real property. The Fifth Circuit balked at this attempt to "thrust [the Sherman Act] past its commerce clause anchorage into the residual expanse of state and individual perogative." *Id.* at 1324.

One month later the Fifth Circuit commented on its holding in *McLain* in a decision finding Sherman Act jurisdiction over the activities of an abortion clinic located in a city which was a regional, interstate center for the provision of medical services. *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (1978). Noting that the flow

of persons crossing state lines to avail themselves of the clinic's services would cease if the clinic were forced to close, the court stated that the holding in *McLain* was not to the contrary:

> The court [in *McLain*] applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.'" 583 F.2d at 1320. We do not read the *McLain* opinion to say that the flow of out-of-state customers is not a factor to be considered in the determining jurisdiction, nor even that jurisdiction can never attach on the sole basis of transactions with out-of-state customers. The court held that residential real estate brokerage activities do not substantially affect interstate commerce because the interstate consequences are remote or incidental. 583 F.2d at 1320 & n.4. That conclusion is unassailable, because few people cross state lines *for the purpose* of purchasing residential real estate. *Feminist, supra,* 586 F.2d at 540 n.3 (emphasis in original).

In the context of this case, if the Real Estate Board of New Orleans, Inc. ceased doing business tomorrow, along with each of the other real estate brokers who are respondents herein, the likelihood that the flow of persons crossing state lines to purchase real estate in the New Orleans area would be curtailed is nil. There are thousands of licensed real estate brokers in the New Orleans area, and in any event, petitioners' own statistics show that many sales of real estate are made without the use of any broker whatsoever. To put it bluntly, if all of the respondents ceased their brokerage activities tomorrow, the flow of persons in and out of New Orleans buying and selling real estate would not be affected one iota. In any event, the effect, if any effect at all, would not be "substantial and adverse". Furthermore petitioners have neither alleged nor proven any cause-and-

effect connection between petitioners' alleged restraint of trade and the flow of interstate commerce.

A reasonably clever attorney can always allege some "effect" on interstate commerce.[7] But Sherman Act jurisdiction is not satisfied by some speculative "effect" on interstate commerce. In a line of decisions defining Sherman Act jurisdiction this Court has consistently required that there be a showing of "substantial and adverse" effects on interstate commerce. *Hospital Bldg. Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 743 (1976); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 758 (1975); *United States* v. *Employing Plasterers Assoc.,* 347 U.S. 186, 187 (1954); *United States* v. *Women's Sportswear Assoc.,* 336 U.S. 460, 464 (1949); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948).[8]

When the district courts have found the nexus between the alleged conduct and interstate commerce too slight to support subject-matter jurisdiction, they have dismissed the

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[7] As one court noted, "the complexity of modern business leaves little room for contracts, or business transactions, which cannnot be said in some degree to affect interstate commerce." *Marston* v. *Ann Arbor Property Managers Ass'n.,* 302 F.Supp. 1276, 1279 E.D. Mich. 1969), *aff'd,* 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied,* 399 U.S. 929 (1970).

[8] For example, in *Women's Sportswear, supra,* an association of stitching contractors which handled fifty percent (50%) of all sportswear produced in Boston had prevented price competition by forcing jobbers to enter into agreements constituting restraints of trade. In support of its conclusion that the unlawful restraint substantially affected interstate commerce, this Court stated:

> The Boston area ranks fifth in this country's production of women's sportswear. Its jobbers obtain 80% of the cloth used from sources outside of Massachusetts. At least 80% of the finished sportswear is sold and shipped to customers outside of that state. *Id.* at 461-62.

action prior to trial. Several courts have refused to recognize subject-matter jurisdiction over alleged anticompetitive activities relating to real estate transactions.[9] The consensus of these decisions is that "mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act." *Diversified Brokerage Services Inc.* v. *Greater Des Moines Bd. of Realtors,* 521 F.2d 1343, 1346 (8th Cir. 1975); *Bryan* v. *Stillwater Bd. of Realtors,* 578 F.2d 1319, 1325-1326 (10th Cir. 1977); *Marston* v. *Ann Arbor Property Managers Ass'n.,* 302 F. Supp. 1276, 1279, *aff'd.,* 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied,* 399 U.S. 929 (1970); *Cotillion Club, Inc.* v. *Detroit Real Estate Bd.,* 303 F.Supp. 850, 954 (E.D.Mich. 1964). In the case below the alleged restraints concerned the

[9] Cases refusing Sherman Act jurisdiction over actions unrelated to real estate transactions include: *Page* v. *Work,* 290 F.2d 323 (9th Cir. 1961) (conspiracy to exclude local newspapers from publishing legal notices); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969) (anticompetitive activities "directed at" local incidents of victim's garbage disposal business); *Kallen* v. *Nexus Corp.,* 353 F.Supp. 33 (N.D.Ill. 1973) (interstate advertising, solicitation, preparation of course materials, competition for lecturers, and movement of students did not alter local character of bar review course); *Elizabeth Hospital* v. *Richardson,* 269 F.2d 167 (8th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959) (hospital); *Spears Free Client and Hospital* v. *Cleere,* 197 F.2d 125 (10th Cir. 1952) (hospital); *Lieberthal* v. *North Country Lane, Inc.,* 332 F.2d 269 (2nd Cir. 1964) (operation of bowling alley is essentially local); *Evanston Cab Co.* v. *City of Chicago,* 325 F.2d 907 (7th Cir. 1963), *cert. denied,* 337 U.S. 943 (1964) (taxi cabs); *Rosemound Sand & Gravel* v. *Lambert Sand & Gravel,* 469 F.2d 416 (5th Cir. 1972) (sand and gravel mined and sold in Louisiana for Louisiana construction projects is local activity); *Lawson* v. *Woodmere,* 217 F.2d 148 (4th Cir. 1954) (burial vaults); *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F.Supp. 664 (W.D.Mo. 1961), *aff'd. per curiam,* 301 F.2d (8th Cir. 1962) (barbers in metropolitan area).

purchase and sale of real estate in the New Orleans area. This is local commerce and the competition allegedly restrained is local in nature. *Cotillion Club, Inc.* v. *Detroit Real Estate Bd., supra* at 854; *Marston* v. *Ann Arbor Property Managers Ass'n.,* 302 F.Supp. 1276, 1279 (E.D. Mich. 1969); *aff'd.,* 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied,* 399 U.S. 929 (1979).

Under our system of federalism the states have traditionally controlled and defined the legal rights and powers attending the purchase, use, and sale of real estate. As this Court has stated:

> [Federalism embodies] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. *Younger* v. *Harris,* 401 U.S. 37, 44-45 (1971).

As with all states, Louisiana regulates the activities of its real estate brokers.[10] In Louisiana a Real Estate Commission promulgates the standards and procedures for obtaining a brokerage license and polices the activities of the state's brokers.[11] A real estate transaction in Louisiana must be consummated and perfected entirely in accordance with Louisiana law, and Louisiana law alone. In addition, Louisiana has enacted its own antitrust statutes that provide civil remedies for injured parties and establish criminal

[10] La. Rev. Stat. Ann. §§ 37:1431 to 1464 (West. Supp. 1979).

[11] La. Rev. Stat. Ann. §§ 37:1432 to 1435 (West. Supp. 1979).

and civil sanctions for antitrust violations.[12] Reflecting its citizens' vigorous opposition to anticompetitive activities carried on within state boundaries, the Louisiana Constitution declares that "all combinations, trusts, or conspiracies in restraint of trade, commerce or business, as well as all monopolies or combinations to monopolize trade, commerce or business, are hereby prohibited in the State of Louisiana. . . ." La. Const. Art. XIX, § 14. In short, the State of Louisiana has a fundamental interest in regulating the purchase and sale of real estate within its boundaries.

In *Marston, supra,* similar state concerns underpinned the court's finding that an alleged conspiracy to fix the price level of rental apartments in Ann Arbor, Michigan, did not have a substantially adverse effect on interstate commerce:

> If the court were to assume that defendants' actions, indirect and remote as they may be to interstate commerce, were to affect interstate commerce, it would follow that all such acts, remote to the main stream of interstate commerce, are subject to the federal antitrust laws, no matter how local may be their operations. What then remains of state antitrust enforcement? The State of Michigan specifically provides regulations for and safeguards against "Restraint of Trade" through its own and adequate laws. . . .
>
> The "Restraint of Trade", if any, is strictly a local problem. Plaintiffs should seek their remedy under state law. *Marston, supra,* 302 F.Supp. at 1280.

In addition to the local nature of real estate, the full panoply of state-law remedies for antitrust violations, and the bottleneck of cases pending in the federal courts, antitrust suits frequently entail enormous expense:

> Win, lose, or draw regarding the final outcome, the very fact of trial may result in crushing costs and

[12] La. Rev. Stat. Ann. §§ 51:121 to 152 (West).

> hardships to the defendant. *McLain, supra,* 583 F.2d at 1323.

This combination of factors justified the district court's decision to discard the petitioners' attempt to bootstrap their local action into a Sherman Act case through allegations of interstate movement of home-buyers.

CONCLUSION

For these reasons, NAR and its members urge this Honorable Court to affirm the judgment of the District Court and the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1979, the undersigned counsel caused three copies of this Brief *Amicus Curiae* to be hand delivered, or delivered by U.S. mail, postage prepaid, to counsels for respondents, petitioners, and the United States. I further certify that all parties required to be served have been served.

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